UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ELIJAH WILLIE AKPAN, Defendant.	2:05-cr-00304-RCJ-RJJ **ORDER**

On September 26, 2008, Magistrate Judge Robert J. Johnston issued a Report and Recommendation (#129) in which he recommended that the Court deny Defendant's Motion to Suppress Evidence. (#68). Now before the Court are Defendant's objections to certain portions of the Magistrate Judge's Report and Recommendation ("R&R"). (#140). The Court must conduct a de novo review of the record in this case in accordance with 28 U.S.C. § 636(b)(1)(B) and LR IB 3-2. IT IS HEREBY ORDERED that Magistrate Judge Robert J. Johnston's R&R is AFFIRMED and ADOPTED and that Defendant's Motion to Suppress is DENIED.

I. FACTS

Defendant Elijah Willie Akpan ("Akpan") operates a company called Tropicana Medical Supply ("TMS") in Las Vegas, Nevada, which is a supplier of durable medical equipment ("DME") (#82, SA Benedetti's Affidavit at 9). DME refers to products that are designed for repeated use and for medical purposes, such as knee braces, prosthetic limbs, back braces, and wheelchairs. (*See id.* at 8). TMS is authorized to submit claim forms to Medicare and Medicaid for reimbursement for DME and medical supplies that TMS provides to Medicare and Medicaid beneficiaries.

Several years ago, the Health and Human Services-Office of Inspector General and the State of Nevada Attorney General's Office commenced an investigation into Akpan and TMS's Medicaid and Medicare billing practices. (*See id.* at 9). Plaintiff The United States of America (the "Government") believed that Akpan was using his TMS business to defraud Medicare and Medicaid, in violation of 18 U.S.C. § 1347, by billing the accounts of Medicare and Medicaid beneficiaries for DME and medical supplies, which TMS (1) did not actually provide; (2) provided, but in amounts that were less than claimed; (3) provided, but consisting of styles or models that were less expensive than claimed; and (4) provided without seeking authorization or a prescription from a physician. (*See id.*). In late 2003 and early 2004, the Government interviewed several former TMS employees. The Government's investigation led the Government to believe that it had probable cause to search and seize evidence of Akpan's alleged fraudulent scheme from Akpan's residence and from TMS business premises.

In January 2005, the Government secured a search warrant for six locations: Akpan's residence, three TMS retail outlets, and two storage units used for TMS equipment and supplies (the "Search Warrant"). (#82, Ex. A). The Search Warrant consisted of the Search Warrant, a sworn affidavit by FBI Special Agent Jason E. Benedetti ("SA Benedetti Affidavit"), and three attachments. Attachment A listed six locations to be searched; Attachment B listed items to be seized; and Attachment C listed the names of 101 Medicare/Medicaid beneficiaries who had been billed by TMS between January 1, 2000 and September 1, 2003. (#82, SA Benedetti's Affidavit at 16–17).

On January 5, 2005, federal agents for the Government executed the Search Warrant. The agents arrived at Akpan's residence at approximately 12:05 p.m. (#82, Ex. A). Upon arriving at the door, the agents knocked and announced their presence and explained that they were executing a federal search warrant on the residence. (*See id.*). Akpan was present at the home with his wife, their three-year old daughter, Akpan's sister, his sister's fifteen-month old child, and Akpan's mother. (*See id.*). The agents explained that no one was under arrest. (*See id.*).

The agents performed a protective sweep to secure the residence. (*See id.*). Once the house was secure, the agents informed Akpan and his family that they could leave at any time and were not required to stay at the residence. (*See id.*). If they decided to leave the home, however, an agent explained that Akpan and his family would not be allowed to re-enter until after the search was completed. (#82, Ex. D, ¶6). Also, if Akpan and his family chose to stay in the home, an agent instructed them that Akpan and his family would have to remain in a central location for the protection and safety of the agents. (#82, Ex. C, ¶14). After discussing the options with his family, Akpan told the agents that he and his family were going to stay in the home. (#82, Ex. D, ¶7).

After the search began, two agents asked Akpan if they could interview him. (#82, Ex. C, ¶22). Prior to the interview, they informed Akpan that he was not under arrest, that the interview was voluntary, and he could leave at any time. (*See id.*). Akpan asked if he needed his attorney. The agents responded that they could not advise him on that matter. (*See id.* at ¶24). He responded by stating that he had nothing to hide and agreed to speak to the agents without his attorney. (*See id.*). Akpan was not given *Miranda* warnings. (*See id.* at ¶22). After the first interview was completed, Akpan joined his family, who were staying in the basement. (*See id.* at ¶28). The agents then asked Akpan if they could interview him again. (*See id.* at ¶29). Without giving him any *Miranda* warnings, the agents interviewed Akpan again.

The search took approximately seven hours. (#82, Ex. A). At the conclusion of the search, exit photographs and a videotape recording were taken to show the condition of the residence. (*See id.*). Akpan, along with an agent, conducted a final walk through of the residence. (*See id.*).

In August 2005, Akpan was indicted on twelve charges of healthcare fraud. (#1). Akpan pled not guilty. (#8). In May 2006, the Government filed a superseding indictment, bringing 129 counts against Akpan. (#25). Trial has been continued several times. In August 2007, Akpan filed his Motion to Suppress (#68). In November 2007, the Magistrate Judge held a three-day evidentiary hearing on the motion. (#99, #100, #103). The Magistrate Judge issued his R&R in September

2008, in which he recommended that Akpan's Motion to Suppress be denied. Akpan has now objected to certain portions of the R&R. (#129, #140).

II. LEGAL STANDARD

When considering a magistrate judge's report and recommendation denying a motion to suppress, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1) (2005). Further, under 28 U.S.C. § 636(b)(1), if a party makes a timely objection to the magistrate judge's recommendation, then this Court is required to "make a de novo determination of those portions of the [report and recommendation] to which objection is made." *Id.* District courts are not required to conduct "any review at all . . . of any issue that is not the subject of objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1) ("[T]he court shall make a de novo determination of those portions of the [R & R] to which objection is made.").

Akpan has filed two primary objections to the R&R. First, Akpan objects to the Magistrate Judge's finding that the Search Warrant was sufficiently particular and constitutional under the Fourth Amendment. Second, Akpan objects to the Magistrate Judge's finding that the statements that Akpan made during his interviews were not procured in violation of the Fifth Amendment. During oral argument, Akpan also challenged the Magistrate Judge's finding that Akpan does not have standing to challenge the search of the TMS business premises.

III. FOURTH AMENDMENT

The Fourth Amendment requires that a warrant describe both the place to be searched and the person or things to be seized. *See* U.S. Const. amend IV. The requirement of "specificity" has "two aspects": "particularity and breadth . . . . Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *U.S. v. SDI Future Health, Inc.*, ---

F.3d ----, 2009 WL 174910, at *9 (9th Cir. 2009) (quoting *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856–57 (9th Cir. 1991) (internal citations omitted)).

A. Incorporation of the Affidavit

Before evaluating the constitutionality of the Search Warrant, the Court must answer the threshold question of whether the Search Warrant incorporated the accompanying affidavit. *See U.S. v. SDI Future Health, Inc.*, --- F.3d ----, 2009 WL 174910, at *7 (9th Cir. 2009). *See also, United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993) ("Only after the content of 'the search warrant' is established . . . can the warrant be tested to see if it meets [the Fourth Amendment's] requirements."). A warrant that is otherwise deficient for lack of particularity or overbreadth can be cured by an incorporated affidavit. The Ninth Circuit requires two things in order for the Government to rely on the affidavit to overcome deficiencies in a search warrant. First, the affidavit must be expressly incorporated into and made a part of the warrant through use of "suitable words of reference." Second, the affidavit must be present during the execution of the warrant so that it can be referred to by the agents in guiding their seizure of documents or things. *See United States v. Towne*, 997 F.2d 537, 545 (9th Cir. 1993).

The Search Warrant incorporated SA Benedetti's Affidavit. A warrant expressly incorporates an affidavit when it uses "suitable words of reference." *SDI Future Health, Inc.*, 2009 WL 174910 at *8. The Search Warrant expressly stated that SA Benedetti's Affidavit was "attached to and incorporated" into the Search Warrant and that SA Benedetti's Affidavit established probable cause for the Search Warrant. (#82, Ex. F). Although "there are no required magic words of incorporation," the Search Warrant could not have more clearly expressed that it was incorporating SA Benedetti's Affidavit.

Additionally, SA Benedetti's Affidavit was present during the execution of the Search Warrant. Special Agent Hollie stated in his affidavit that he had a copy of SA Benedetti's Affidavit when the search of Akpan's home was conducted. (#82, Ex. C, ¶15). Immediately prior to the

search, the agents had a "staging" meeting close to Akpan's residence during which the participating agents were required to read SA Benedetti's Affidavit. (*See id.* at ¶3). Therefore, the Affidavit was present and available during the search, and that is all that is required. Each agent who participated in the search was not required to carry his or her own copy of SA Benedetti's Affidavit, and the Government was not required to provide Akpan or his family members with a copy of the curative document. *SDI Future Health, Inc*., 2009 WL 174910 at *8–9 (noting that the Supreme Court in *United States v. Grubbs*, 547 U.S. 90 (2006) overruled the Ninth Circuit's previous position that officers executing a search needed to "present any curative document . . . to the persons whose property is to be subjected to the search."). Because the Government made SA Benedetti's Affidavit available during the search, the Affidavit accompanied the Search Warrant and served its purpose of limiting the discretion of the federal officers in executing the search. *See id.*

B. Particularity

Particularity requires that a warrant's description be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized. *See United States v. Silva*, 247 F.3d 1051, 1057 (9th Cir. 2001); *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). This requirement prevents general, exploratory searches and indiscriminate rummaging through a person's belongings. *See id.*; *United States v. McClintock*, 748 F.2d 1278, 1282 (9th Cir. 1984). It also ensures that the magistrate issuing the warrant is fully apprised of the scope of the search and can thus accurately determine whether the entire search is supported by probable cause. *See Spilotro*, 800 F.2d at 963; *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982).

The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved. *See Spilotro*, 800 F.2d at 963. "Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible." *Id.*; *see also United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). "While a search warrant must describe items to be seized with particularity sufficient to prevent a

general, exploratory rummaging in a person's belongings, it need only be reasonably specific, rather than elaborately detailed." *United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996) (internal quotation marks and citations omitted).

In the Ninth Circuit's recent decision in *U.S. v. SDI Future Health, Inc*., the Court of Appeals reviewed the constitutionality of a search warrant that was executed by the Internal Revenue Service and four other federal and Nevada state agencies for SDI Future Health, Inc. ("SDI"), a California corporation, that the Government believed to have been engaged in "wide-ranging Medicare fraud" and tax fraud. *Id.* at *1. The warrant relied on an affidavit, which contained information that a government agent had learned from three former employees and two business associates of SDI. *See id.* The affidavit detailed the conspiracy in which SDI had participated in which it defrauded the Medicare program by seeking payment for services that SDI had never rendered. *See id.* The district court, affirming the magistrate judge's recommendation, concluded that the items listed in the search warrant were overbroad and lacked sufficient particularity because "[t]he search warrant did not limit these general categories of business documents and financial records to the seizure of records relating to the criminal activity described in the affidavit," and because they lacked "any time restriction." *Id*. at *3.

The Ninth Circuit disagreed with the district court's finding that the warrant was unconstitutional for lack of particularity. The Court of Appeals concluded that "[e]ven the most troubling items on the list, such as '[r]olodexes, address books and calendars,' are particular in that they 'enable the person conducting the search reasonably to identify the things authorized to be seized.'" *Id.* at *9 (citation omitted). To illustrate its point, the Court of Appeals explained that "[t]he officers could tell from the warrant that, should they happen upon a rolodex, they should seize it." *Id.* Thus, [b]ecause the warrant was not vague as to what it directed law enforcement officers to search for and to seize," the warrant "did not lack particularity for Fourth Amendment purposes." *Id.* As a concluding statement on its decision related to particularity, the Court of Appeals explained

that the district court's erroneous reasoning was "understandable" because the Ninth Circuit's prior treatment of this issue had conflated the particularity and overbreadth inquiries. *Id*. at *10.

The warrant in the present case is not any different from the warrant in *U.S. v. SDI Future Health, Inc*. in that the items listed do not lack particularity. There are certain items (*e.g*., appointment books, calendars, and business schedules) that are more general than others, but are not vague as to what these categories directed law enforcement officers to search for and to seize. To follow the Ninth Circuit's reasoning, the officers executing the Search Warrant could have understood from the warrant that, should they have found an appointment book or calendar, they should have seized it. Furthermore, SA Benedetti's Affidavit sufficiently detailed the criminal activity that was the basis for the search so as to let the Government's agents understand "what it [was] that they [were] being asked to search for and seize from the target property." *U.S. v. Bridges*, 344 F.3d 1010, 1017 (9th Cir. 2003) ("The Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search *or, alternatively*, what criminal activity is suspected of having been perpetrated.") (emphasis added)). The agents were not "left to speculate as to what [was] the underlying purpose or nature of the search." *Id.* SA Benedetii's Affidavit clarified that the agents were to not only seize any calendar or business schedule, but a calendar or business schedule related to a Medicare or Medicaid scheme. Thus, particularity is not the problem with the warrant in this case.

C. Breadth

"A warrant must not only give clear instructions to a search team, it must also give legal, that is, not overbroad, instructions." *SDI Future Health, Inc*., 2009 WL 174910, at *10. "Under the Fourth Amendment, this means that 'there [must] be probable cause to seize the particular thing[s] named in the warrant.'" *Id.* (quoting *In re Grand Jury Subpoenas*, 926 F.2d at 857). "[P]robable cause means a fair probability that contraband or evidence of a crime will be found in a particular place, based on the totality of circumstances." *Id.* (citations omitted).

Akpan contends that the Search Warrant is similar to those struck down by the Ninth Circuit in the *Bridges* and *Kow* decisions. In *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), the defendants were indicted and convicted for corporate tax evasion, individual tax fraud and profit skimming. The affidavit in that case alleged that the business maintained multiple sets of accounting records, paid falsified invoices submitted by phony corporations, and paid employees under the table all for the purpose of defrauding the IRS. *See id.* at 425. The search warrant contained a list of fourteen categories of documents to be seized. *See id.* Many, but not all, of the list of documents consisted of nothing more than generalized descriptions of various types of business records. *See id.* at 427. The Court of Appeals characterized this list as authorizing "the seizure of virtually every document and computer file at HK Video." *Id.*

The Ninth Circuit in *Kow* concluded that the most obvious manner in which the government could have made the warrant more particular would have been to specify the suspected criminal conduct. *See id.* at 427. At most, the warrant suggested that the warrant authorized the search and seizure of evidence related "to 'fraudulent' transactions and possible disparities between actual and reported income." *See id.* Additionally, the government did not limit the scope of the seizure to a time frame in which the suspected criminal activity occurred even though the affidavit indicated that the criminal activity began relatively late in the business's existence. *See id.* Finally, although the affidavit described criminal acts related to violence and tax fraud, the affidavit did not detail a scope of criminal conduct that would have established probable cause for all of the categories of records listed in the warrant. *See id.* at 427– 28,

In *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003), the Ninth Circuit held that the government's affidavit was sufficient to support probable cause that the defendant had engaged in mail fraud and a conspiracy to defraud the United States by making false claims. The affidavit showed that the defendant operated a tax consulting business, through which he advised clients that they could avoid paying federal income taxes if they declared that they were "non-resident aliens."

Id. at 1013. The defendant's business filed more than 100 claims with the IRS requesting tax refunds for its "non-resident alien" clients none of which were ever granted. *Id*. Although there was probable cause to issue a search warrant, the Court of Appeals nevertheless held that the warrant's description of the items to be seized violated the particularity requirement of the Fourth Amendment.

The attachment to the warrant in *Bridges* listed thirteen categories of generic types of business records or equipment to be seized, but without any additional description of the items which limited them to the criminal acts described in the affidavit. *See id.* at 1017. Although the warrant's list of items was detailed, the Court of Appeals found that it was so expansive that its language authorized the government to seize almost all of the defendant's property, papers, and office equipment. The Ninth Circuit, quoting *Kow*, noted that it had "criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected by the Government[.]" *Id*. at 1018. The warrant did not state what criminal activity was being investigated by the IRS and, thus, there was nothing in the warrant to guide the government's agents in seizing property under the broad categories of items to be seized. *See id. Bridges* concluded that such warrants are suspect because "[n]othing on the face of the warrant tells the searching officers for what crime the search is being undertaken." *Id.* (citation omitted). Also, the warrant contained a catch-all phrase, authorizing the seizure of all records relating to clients or victims "including but not limited to " the ones listed on the warrant. *Id.* at 1017–18. Such open-ended language seemed to eviscerate any definite boundaries to the scope of the search.

In *Bridges*, the Ninth Circuit, suggested that the government could have cured the warrant's deficiencies by properly describing the relevant criminal activity through an affidavit. A special agent had submitted an affidavit with the warrant, which described the crimes the defendant had allegedly committed, but the warrant neither incorporated the affidavit by reference, nor was a copy of the affidavit physically attached to the warrant or any of its incorporated parts. *See id.* at 1018.

The Court of Appeals acknowledged that providing the details of the specific crimes being investigated by the IRS "would have served to limit the scope of the warrant." *Id.* at 1019.

In Akpan's case, Attachment B of the Search Warrant listed twenty-one categories of items that were to be searched for and seized. Akpan challenges virtually all of the listed items. However, when the Search Warrant and Attachment are read in connection with SA Benedetti's Affidavit, this Court holds that the listed categories were not overbroad because probable cause did exist to seize all items of those particular types of records.

There are a few of the categories of items that Akpan has focused his objections upon. Akpan objects to paragraph (c), which authorized the seizure of the following:

> Records, memoranda, correspondence, receipts, logs, billing statements, superbills, invoices, insurance claims, explanation of benefits reports, Medicare payment/remittance reports, Medicaid payment/remittance reports, correspondence, and any other account information pertaining to patients for whom durable medical equipment and supplies were billed.

All of the requested records relate to "patients for whom durable medical equipment and supplies were billed." SA Benedetti's Affidavit and the investigation into Akpan and TMS centered upon Akpan's billing practices related to "Durable Medical Equipment" ("DME"), which was a defined term throughout SA Benedetti's Affidavit. (SA Benedetti's Affidavit at 5). In fact, the Affidavit identified the specific types of DME and related health care supplies and services that were the subject of Akpan's alleged scheme. One section articulated the allegations with respect to power wheelchairs; another treated the allegations regarding enteral nutrition supplies; another section laid out the allegations related to the provision of incontinence supplies. (*See id.* 17–33). Although the Government was able to identify 103 beneficiaries who may have been victims of Akpan's fraudulent practices, these names were merely a sample of possible victims. The Government undoubtedly knew that there were likely to be other beneficiaries that had been victimized by Akpan's scheme, but it was not in a position to name every one. "Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to

seizure is not possible." *Spilotro*, 800 F.2d at 963. Thus, the Government cannot be faulted for not identifying every beneficiary that TMS scammed. By recovering the types of materials listed in paragraph (c), however, the Government could possibly identify additional beneficiaries for whom TMS had engaged in fraudulent billing practices. The Government had probable cause to seize such materials. This paragraph was not overbroad.

Akpan objects to paragraph (g), which authorized the seizure of the following:

> Communications between Tropicana Medical Supply and any delivery companies or other medical supply companies showing business relationships regarding medical supplies, medical equipment, methods of delivery, proof of delivery, evidence of agreements to deliver products, or share in cash flow from such deliveries.

This paragraph is limited to a certain type of communication from a specific company. The entire investigation related to Akpan's wrongful billing practices conducted via TMS. This paragraph did not authorize the seizure of all TMS communications, but those related to medical supplies and medical equipment, the subject matter of Akpan's scheme. Such evidence would have been highly relevant to the Government's investigation because the alleged scheme involved Akpan billing Medicaid and Medicare for DME equipment and supplies, which Akpan or TMS never actually ordered or provided to the beneficiaries. Thus, there was probable cause to seize such evidence as described in paragraph (g) and the language of paragraph (g) was sufficiently limited.

Akpan objects to paragraph (s), which authorized the seizure of "[p]assports, travel visas, and any other records, documents, or materials which relate to the travel" of Akpan. Although all of Akpan's travel documents would be overbroad when standing on its own, when read in connection with SA Benedetti's Affidavit, paragraph (s) obviously referred to travel documents related to the alleged Medicare/Medicaid scheme. The Government's investigation had revealed that over the course of several years, Akpan had traveled numerous times to Nigeria and had transported significant sums of cash to Nigeria. (SA Benedetti's Affidavit at 36). Thus, there was probable cause to search and seize such evidence and the language in paragraph (s) was not overbroad.

Akpan objects to paragraph (f), which authorized the seizure of "[a]ppointment books, calendars, delivery logs, and business schedules." The Government could have been more specific with this category of items. However, the Court's reasoning to uphold this category of items is no different from that underlying the constitutionality of the other categories discussed above. When paragraph (f) is read in connection with SA Benedetti's Affidavit, the required specificity is present. The Government had probable cause to search and seize such evidence because the Government's investigation had revealed that Akpan had been supplying different DME and supplies than reported or not even supplying any DME or supplies at all. It would have been important to have delivery logs to determine whether certain reported DME or medical supplies were in fact delivered. Under Nevada law, as a DME supplier, TMS was required to document all deliveries for which it would be reimbursed. Such documents should have existed and would certainly have related to the Government's investigation. Appointment books, calendars, and business schedules could have revealed meetings or discussions with beneficiaries, their physicians, deliveries of DME and related supplies, Akpan's attendance of Medicaid/Medicare billing training, and travels over to Nigeria—all of which would have been relevant to the Government's investigation. In short, on its face, the language of paragraph (f) might have appeared to be overbroad, but when read and executed in connection with SA Benedetti's Affidavit, it is clear that there was probable cause to search and seize such evidence and that the language in paragraph (f) was not overbroad.

The list goes on and on. Akpan objects to paragraph (i), which authorized the search and seizure of "[r]eference materials, manuals, lists of procedure codes, price sheets, billing instructions, Medicare newsletters, Medicaid newsletters, memoranda and pamphlets of any information pertaining to the billing of Medicare and Medicaid." This list of items is related specifically to Medicare and Medicaid, the foundation of Akpan's alleged scheme. Information related to billing in particular and TMS's protocol for handling Medicare and Medicaid claims was essential to the Government's investigation. The Court does not see a need to kill a few extra trees to analyze all

twenty-one listed items in the Search Warrant. The Court's position is the same for each one: any deficiencies in the items listed in Attachment B were cured by the detailed affidavit incorporated into the Search Warrant. The Government had probable cause to seize all listed items and the language used in the Search Warrant was not overbroad.

Akpan questions the breadth of the Search Warrant in light of the number of boxes of documents that the Government ultimately seized. However, the Ninth Circuit has acknowledged that "[a]ny search for relevant documents is likely to retrieve some information that ultimately is beyond the core of evidentiary material produced at trial." *U.S. v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996), cert. denied, 519 U.S. 1058 (1997). The Court cannot gauge the constitutionality of a warrant based upon the mere number of documents that are ultimately seized. *See, e.g., U.S. v. Hayes*, 794 F.2d 1348 (9th Cir. 1986) (denying argument that warrant was overbroad because it allowed the government to examine thousands of files and stating that "[t]he number of files that could be scrutinized, however, is not determinative.").

D. Time Restriction

Akpan stresses the absence of express time limitations on the categories of evidence listed in the Search Warrant. The Ninth Circuit, in *Center Art Galleries* and *Kow*, criticized the absence of time limitations in the warrants regarding the generically described documents in those cases. The Search Warrant stated that the probable case was based on SA Benedetti's Affidavit, which described the investigation into Akpan's alleged fraudulent practices as revealed by billing records dating back to 2000. In connection with the suppression hearing conducted by the Magistrate Judge, the Magistrate Judge reviewed, in camera, a detailed schedule of items seized by the Government. (#109 at 7–8). After reviewing the schedule, the Magistrate Judge determined that a mere 55 out of 8,167 documents seized predated 2000. Such a finding is indicative of an understanding by the agents enforcing the Search Warrant of an approximate time limit on the records to be seized, which time limit was consistent with the information provided in SA Benedetti's Affidavit. Although the

Government could have included a time period in the warrant to limit the seizure to the period beginning from a more precise date, the Court finds that such a limitation was not reasonably required in regard to the foregoing categories of documents.

Akpan argues that a search warrant cannot be upheld if there is no date restriction on the records to be searched. The law does not support Akpan's position. In cases such as *Kow*, the Ninth Circuit has discussed its concern with the lack of a time restriction, but such cases clearly reveal that the crux of the problem with the warrants in those cases was the failure to sufficiently describe the items to be searched and the criminal activity that was the subject of the search warrant. In *Kow*, the Ninth Circuit stated that the most obvious manner in which the government could have corrected the deficient warrant was by describing the applicable criminal violation, not adding a time restriction. *See* 58 F.3d at 427.

To adopt Akpan's position that a time restriction is the sine qua non of the constitutionality of a search warrant would fly in the face of Supreme Court precedent. In *United States v. Grubbs*, the Supreme Court held that an anticipatory search warrant did not contravene the Fourth Amendment for its failure to expressly include the triggering condition for the anticipatory warrant. The Court reasoned that the Fourth Amendment "does not set forth some general 'particularity requirement.'" *Id*. at 97. Relying upon the text of the Fourth Amendment, the Court observed that the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'" *Id*. The Court added that it has "rejected efforts to expand the scope of this provision to embrace unenumerated matters." *Id.* A time limitation is not one of the two prerequisites for a warrant to pass muster under the Fourth Amendment. The Court must follow the Supreme Court's lead in declining to expand the scope of the Fourth Amendment. The lack of an express timing requirement in the Search Warrant or SA Benedetti's Affidavit did not render the Search Warrant unconstitutional.

E. Standing to Challenge Search of Business Premises

The Magistrate Judge concluded that Akpan does not have standing to challenge the Search Warrant as to the other five locations searched. Akpan did not raise an objection to this finding in his papers objecting to the R&R, but he expressed his objection to this finding during oral argument. Therefore, the Court will address Akpan's objection.

Akpan's objection relates to the search of five TMS-related locations. Three of the locations were used as retail outlets for the TMS business and the two other locations served as storage units for TMS equipment and supplies.

Akpan's right to challenge the search of commercial premises under the Fourth Amendment is different from his right to do so for his home. The Supreme Court decided long ago that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). To show the government has violated his Fourth Amendment rights, an individual must have "a legitimate expectation of privacy in the invaded place." *United States v. Crawford*, 323 F.3d 700, 706 (9th Cir. 2003) (internal quotation marks and citations omitted). "An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987). Although the expectation of privacy in one's workplace is different, it may still exist in certain circumstances. *SDI Future Health, Inc.*, 2009 WL 174910, at *4.

Akpan argues that he had an expectation of privacy in the other five searched locations because (1) he and his wife are sole shareholders of TMS; (2) he leased the premises that were searched; (3) he has the right to exclude others from the premises as the renter; and (4) he uses the searched premises and keeps personal items there. (#89, Ex. A). In *SDI Future Health, Inc.*, the Ninth Circuit explained its position regarding the standing of a corporate employee or officer to challenge a search of corporate premises. In that case, the government argued that Todd Kaplan,

who was the president and part-owner of SDI, and Jack Brunk, who was an officer and part-owner of SDI, lacked standing to challenge the government's search of SDI's premises. *See id.* at *3.

The Ninth Circuit offered several "guideposts" to direct this analysis. First and foremost, "it is crucial to Fourth Amendment standing that the place searched be 'given over to [the defendant's] exclusive use." *Id.* at *4. Although Akpan asserts that he used the searched premises as his office. His mere use is not enough. Akpan must have had exclusive use of the searched premises. Akpan has presented no evidence that he was the only individual who had access to and who used the searched premises. Additionally, the Ninth Circuit articulated that possessing "managerial authority alone" or a proprietary interest in the business does not create a privacy interest: "a reasonable expectation of privacy does not arise *ex officio*, but must be established with respect to the person in question." *Id.* Therefore, Akpan's ownership or managerial control over the business and its premises does not automatically create an expectation of privacy in the searched premises.

The business owners in *SDI Future Health, Inc*. had relied upon the Ninth Circuit's decision in *United States v. Gonzalez*, 412 F.3d 1102 (9th Cir. 2005), where the Court of Appeals had upheld a business owner's standing to challenge the search of business premises. *SDI Future Health, Inc*., 2009 WL 174910, at *4–5. The Ninth Circuit rejected the reliance upon *Gonzalez*, highlighting the narrowness of its holding in that decision. In *Gonzalez*, the business was a small, family-owned business; the defendants managed the day-to-day operations of the business; and the defendants owned the building in which the business offices were located and had access to the entire building. *Id.* at *5. Because the defendants in *SDI Future Health, Inc*. did not operate SDI on a daily basis as a family-owned business, the Ninth Circuit declined to find *Gonzalez* controlling. The Ninth Circuit went on to hold that "except in the case of a small, family-run business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized." *Id.* at *6.

Because there is no evidence that the facts of Akpan's situation mirror those of *Gonzalez*, Akpan must show some "personal connection" to the places searched and materials seized. To establish a "personal connection," Akpan must produce evidence regarding the following factors: "(1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; 2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization." *Id.* Despite having a three-day evidentiary hearing on his motion to suppress, Akpan has failed to produce any evidence that would go to any of these three factors. He has not explained that the Government seized evidence from the TMS premises that was in fact personal property as distinguished from property that had a relationship to his TMS business or that Akpan took personal precautions to protect such property from being seized. With respect to the storage units, Akpan has admitted that he did not use those units as an office or for personal use, but that it was used only for the TMS business. (#89, Akpan Declaration, ¶¶ 4–5). Although he may have kept some personal items at the other retail locations or had an office in those locations, he did not exclusively use those locations. According to the Government's report, Akpan employed eight to nine individuals to work at the retail outlets. (#82, Ex. B at 2). In sum, the fact that Akpan owned the TMS business, rented out the searched TMS premises, and kept some personal items in those premises does not establish the "personal connection" or "exclusive use" that the Ninth Circuit has required to create a legitimate expectation of privacy interest in the searched business premises. Akpan has the burden of establishing his legitimate expectations of privacy in the searched premises. *United States v. Zermeno*, 66 F.3d 1058, 1061 (9th Cir. 1995). The evidence that he has proffered has failed to meet that burden.

In light of the foregoing, the Court holds that the Search Warrant met the Fourth Amendment's specificity requirements. The Search Warrant, in connection with SA Benedetti's

Affidavit, was sufficiently particular and was not overbroad. Additionally, the Court holds that Akpan did not have a legitimate expectation of privacy in the commercial premises that were searched and he does not have standing to challenge those searches.

IV. FIFTH AMENDMENT

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona*, the Supreme Court held that a suspect must be advised of his Fifth Amendment rights before being subject to a custodial interrogation. 384 U.S. 436, 444–45 (1966); *see also, Dickerson v. United States*, 530 U.S. 428 (2000) (holding *Miranda* to be constitutional). The parties agree that Akpan was interrogated but not given *Miranda* warnings. Therefore, the only issue before this Court is whether Akpan was in custody at the time of his interrogation.

When a suspect has not formally been taken into police custody, a suspect is nevertheless considered "in custody" for purposes of *Miranda* if the suspect has been "deprived of his freedom of action in any significant way." 384 U.S. at 444. To determine whether the suspect was in custody, the Court first examines the totality of the circumstances surrounding the interrogation. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The Court must then determine whether a reasonable person in those circumstances would "have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* Accordingly, taking into account the totality of the circumstances, the Court must decide whether a reasonable person in Akpan's position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation.

The Ninth Circuit recently released its opinion in *U.S. v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), which is on point to the issue in this case: "under what circumstances under the Fifth Amendment does an interrogation by law enforcement officers in the suspect's own home turn the home into such a police-dominated atmosphere that the interrogation becomes custodial in nature

and requires *Miranda* warnings?" *Id.* at 1077 (emphasis added). In *Craighead*, the FBI investigated and determined that the defendant was in possession of and had distributed child pornography. *See id.* at 1078. The FBI secured a search warrant for his home. *See id.* Eight law enforcement officers from three different agencies participated in the search of his home. *See id.* Two agents asked the defendant to have a conversation with them in a storage room in the back of the defendant's home. *See id.* The agents did not read the defendant his *Miranda* rights, but informed him that he was not being arrested and that he was free to leave at anytime. *See id.* at 1078–79. During the interview, the defendant made incriminating statements.

The Ninth Circuit observed that the typical standard that requires a court to determine whether a reasonable person would have felt deprived of his freedom of action in any significant way presents "analytical challenges" when the relevant interrogation took place within the home. *See id.* at 1082. The Ninth Circuit framed the novelty and complexity of this situation by stating the following: "If a reasonable person is interrogated inside his own home and is told he is 'free to leave,' where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To be 'free' to leave is a hollow right if the one place the suspect cannot go is his own home." *Id.* at 1083. The Ninth Circuit acknowledged that courts have "generally been much less likely to find that an interrogation in the suspect's home was custodial in nature." *Id.* At the same time, "an interrogation in the suspect's home may be found to be custodial under certain circumstances." *Id.* Because of the unique nature of an interrogation inside the suspect's own home, the Ninth Circuit determined that the *Craighead* case required it to "consider how to apply the traditional *Miranda* inquiry to an in-home interrogation," an issue on which the Ninth Circuit had previously "said little." *Id.* at 1082.

The Ninth Circuit determined that drawing the line between a "non-custodial in-home interrogation from a custodial one" hinges on "the extent to which the circumstances of the interrogation turned the otherwise comfortable and familiar surroundings of the home into a

'police-dominated atmosphere.'" *Id*. at 1083. To render a decision on this "police-dominated atmosphere" benchmark, the Ninth Circuit determined that a court should consider the following four factors:

> (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

Id. at 1084.

A. Number of Law Enforcement Officers

First, the Court should examine the number of law enforcement officers that participated in the search of Akpan's residence. "[T]he presence of a large number of visibly armed law enforcement officers goes a long way towards making the suspect's home a police-dominated atmosphere." *Id.* The Ninth Circuit stated that "when the number of law enforcement personnel far outnumber the suspect, the suspect may reasonably believe that, should he attempt to leave, he will be stopped by one of the many officers he will encounter on the way out." *Id*. at 1083–84. In one of the primary cases relied upon by the Ninth Circuit, *United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007), the First Circuit determined that the presence of eight officers in the home, one of whom unholstered his gun, contributed to a police-dominated environment. *Id.* at 1085. Similarly, in *Craighead*, eight law enforcement officers, accompanied by two other non-law enforcement officers entered the defendant's home as part of the search. *See id.* The law enforcement officers were all armed, some had protective gear, and some of them unholstered their weapons. *See id.* As a result, the Ninth Circuit held that a reasonable person in the defendant's position would feel that his home was dominated by law enforcement agents and that they had come prepared for a confrontation. *See id.*

In the present case, approximately ten FBI agents participated in the search of Akpan's home. (#82, Ex. D). In addition, one or two computer forensics experts participated. (#82, Ex. C). All ten

law enforcement agents donned bulletproof vests and raid gear. (#82, Ex. D). They were armed. (*See id.*). Whether any of them unholstered their weapons is unclear. Akpan and his wife said that some agents drew their weapons (#68, Ex. A and B), but certain agents said they did not. (#82, Ex. C, at ¶ 6). Although Akpan's family members were also present, it was clear that the only suspect who was the subject of the investigation was Akpan. The first *Craighead* factor weighs in Akpan's favor. The number of law enforcement officers outnumbered Akpan.

B. Restraint

Second, the Court must consider whether the suspect was at any point restrained, either by physical force or by threats. In *Craighead*, the defendant was not physically restrained, but was escorted to a back storage room and the door was closed behind him. *See id.* at 1086. The Ninth Circuit focused on the fact that one of the agents in the storage room appeared (according to the defendant) to be leaning with his back to the door in such a way as to block the defendant's exit from the room. *See id.* The defendant testified that he did not feel he had the freedom to leave the storage room because, in order to get to the room's only door, he "would have either had to have moved the police detective or asked him to move." *Id.* The Ninth Circuit acknowledged that "not everyone in this circumstance would have felt restrained," but that "it was certainly objectively reasonable for [the defendant] to believe he was under guard." *Id.*

The present case is different. Like the defendant in *Craighead*, Akpan was not physically restrained or handcuffed. (#82, Ex. C). Unlike the defendant in *Craighead*, Akpan was not in a closed-off room, the only exit of which was blocked by an armed officer. (*See id.*). Instead, Akpan sat in an open den area next to the kitchen. (*See id.*). Also, Akpan chose where to sit and sat on a couch facing the open door of his home, not on a box like the defendant in *Craighead*. (*See id.*). Akpan's family remained in a large furnished room in the basement.

However, the Ninth Circuit stated that "[r]estraint amounting to custody may also be inferred where law enforcement officers permit the suspect to move around the house for brief periods but

insist on escorting and monitoring him at all times." 539 F.3d at 1085. In *Mittel-Carey*, the First Circuit found custody to have occurred because during the course of the government's interrogation of the defendant, government agents escorted the defendant whenever he needed to move, such as when he needed to go to the bathroom. 493 F.3d at 40. Akpan's wife stated that in the one or two instances where she needed to leave the basement where the family was remaining during the search, she felt like she had to ask permission from the agents. (#68, Ex. B). For example, when she needed to get some food for her three-year old daughter, she felt like she needed to ask one of the agents permission to go to the kitchen. (*See id.*).

One fatal flaw in Akpan's case is Akpan's consent to remain in the home during the search. Although Akpan's family may have been limited in their movement while in the confines of their home, the Government explained to Akpan and his family that they could leave the residence during the search, but that if they remained in the home during the search, they needed to remain in one location. Some limitation on the family's movements within the home during the course of the search was reasonably necessary to preserve the integrity of the search. *See, e.g., United States v. Axsom*, 289 F.3d 496, 503 (8th Cir. 2002) (deciding that a reasonable person in the suspect's "shoes should have realized the agents escorted him not to restrict his movement, but to protect themselves and the integrity of the search."). Akpan and his family agreed to remain in the house under those conditions. Akpan argues that in addition to being escorted around the home, the Government blocked Akpan's vehicles in the driveway and would have been required to ask the Government to move their cars to leave. However, Akpan and his family could have still left the home and stayed outside or walked around the neighborhood. According to Akpan's statements in her declaration, Akpan's family appears to have been friends with their neighbors. (#68, Ex. B at ¶ 7).

In *Craighead* and the cases relied upon by the Ninth Circuit in that case, the government agents' conduct was such that it gave the appearance to the suspects that they could not leave. *See, e.g., Sprosty v. Buchler*, 79 F.3d 635, 642–43 (7th Cir. 1996) (finding that police officers' use of

their police cars to block the suspect's driveway to prevent his departure, and their standing so as to block the suspect's exit path from his home, contributed to a custodial environment). Such conduct by government agents should fall, in certain circumstances, within the ambit of restraint or custody. One can envision situations where law enforcement officers could tip-toe their way to the outer boundaries of *Miranda* to interrogate a suspect without technically subjecting the suspect to custody and triggering *Miranda*. For example, an officer could tell a suspect that he is free to leave an office or room, but the suspect soon finds out that the door is being guarded by an armed police officer and his drooling, superbly trained attack dog. Alternatively, an officer could omit to tell the suspect that she is free to leave her home and give her significant freedom to move from room to room, but the suspect soon finds out that she cannot even make a cup of coffee without an officer peering over her shoulder to see how many lumps of sugar she is using. In these hypothetical scenarios, one can see how law enforcement officers could simultaneously succeed in complying with and frustrating the policies underlying *Miranda*. Courts understandably want to discourage such strategic interrogation on the part of law enforcement. To that end, courts, like those in *Craighead* and *Sprosty*, have held that law enforcement can still restrain a suspect and put them in custody, triggering *Miranda,* even though they do not physically restrain or threaten the suspects. Where the facts reflect an obvious effort on law enforcement's part to indirectly or implicitly restrict the suspect's freedom, such that a reasonable suspect would "have felt he or she was not at liberty to terminate the interrogation and leave," custody is properly found. *Craighead*, 539 F.3d at 1088.

The present case simply does not display such efforts on the part of the Government. If Akpan and his family had been required to stay in the home and then needed escorting throughout the home, such a situation may have risen to the level of restraint. Even if the Government had simply failed to explain that Akpan could leave the home, custody may have occurred. To the contrary, the Government expressly explained to Akpan and his family at the outset and during the course of the search that they were free to leave the home. Akpan complains about the constraints

upon him and his family in the home. However, some restrictions and supervision were required to protect the integrity of the search. *See Axsom*, 289 F.3d at 503. Akpan does not allege that either him or his family once asked any of the agents to leave the home and that the agents denied their request. Akpan was aware of his freedom to leave. The invitation to leave the home was left open during the search. During that time, his family members were safely sitting around the television in a large, furnished room in the basement and Akpan, when not with his family, was sitting on a couch in his open den. There was no scowling, sinister government agent standing guard at the door. For these reasons, the second factor weighs in favor of the government.

C. Isolation

Third, the Court must consider whether the suspect was isolated from others. "A frequently recurring example of police domination concerns the removal of the suspect from the presence of family, friends, or colleagues who might lend moral support during the questioning and deter a suspect from making inculpatory statements . . . ." *Craighead*, 539 F.3d at 1087 (quoting *United States v. Griffin*, 922 F.2d 1343, 1352 (8th Cir. 1990). In *Craighead*, the defendant was not with family or friends when the government conducted the search, but the government had brought along a non-law enforcement officer for emotional support. However, when the agents questioned the defendant in the storage room, they would not allow that individual in the interview. *See id.* at 1087. The Ninth Circuit found this conduct of exclusion as indicative of the government's control of the defendant's environment: "it is difficult to see how [the defendant] was free to leave if he was, apparently, not free to invite others into the storage room of his own house." *See id.*

In the present case, the third factor weighs in favor of Akpan. The Government interviewed Akpan twice. The first interview took two and a half hours. (#82, Ex. C). The Government separated Akpan from his family during this interview. Once the Akpan completed the first interview, he joined his family in the basement. Once the Government decided that they had additional questions to ask Akpan, they again separated Akpan from his family for another interview.

(*See id.*). The Government made no effort nor suggested that Akpan could answer the Government's questions in the presence of his family. The Supreme Court has been explicit that "the law enforcement technique of isolating the suspect from family and friends is one of the distinguishing features of a custodial interrogation." *Id.* at 1087. This factor weighs in favor of Akpan.

D. Informed of Ability to Leave

Fourth, the Court must consider whether the suspect was informed that questioning was voluntary and that he was free to leave or terminate the interview. The Ninth Circuit stated that "[i]f a law enforcement officer informs the suspect that he is not under arrest, that statements are voluntary, and that he is free to leave at any time, this communication greatly reduces the chance that a suspect will reasonably believe he is in custody." *Id.* In *Craighead*, because the government had told the defendant that he was not under arrest, that his statements were voluntary, and that he was free to leave, this fourth factor weighed in favor of the government. *See id.* However, the Ninth Circuit noted that "[t]he mere recitation of the statement that the suspect is free to leave or terminate the interview, however, does not render an interrogation non-custodial per se" and that it had to "consider the delivery of these statements within the context of the scene as a whole." *Id.* at 1088.

The most important foundation for the Ninth Circuit's finding that the defendant in *Craighead* was in custody, even if the government had told him he was free to leave, was the location of the interview. The Ninth Circuit stated that "[a]n interview conducted in a suspect's kitchen, living room, or bedroom might allow the suspect to take comfort in the familiar surroundings of the home and decrease the sensation of being isolated in a police-dominated atmosphere." *Id*. In contrast, the defendant had been taken to an unfurnished storage room in the back of his home, which required the defendant to sit on a box or chair borrowed from another room. *See id.* at 1089. Also, the room had one door, which was partially blocked by one of the agents.

Another important part of the Ninth Circuit's finding was that the eight agents were from three different agencies. The defendant believed that the presence of agents from three different law enforcement agencies left him with doubt as to whether the interviewing agent had the authority to pronounce him free to leave and that even if the FBI permitted him to leave the storage room, he thought that he might be confronted by members of the other two agencies and forbidden to leave the house. *See id.* at 1088.

Neither of these facts are present in this case. Only one agency, the FBI, was present during the search. Thus, Akpan did not have the same type of doubt as the defendant in *Craighead* as to which agent or agency had the authority to let him leave. Also, Akpan was seated in a comfortable, open, furnished room of the home. In fact, he was questioned in the den area, probably the same area where Akpan and his family invited guests to sit. Thus, this factor weighs in favor of the Government.

Viewing the totality of circumstances, the Court holds that the Government did not turn Akpan's residence into a "police-dominated atmosphere." A crucial part of this result is that Akpan could have removed him and his family from any possibility of interaction with the police by simply telling the agents at the outset of the search that they would accept the Government's invitation to leave the home. If Akpan had simply accepted the Government's invitation to leave, Akpan would not have even been in the presence of the government agents and would possibly never have been in a position to be asked to engage in an interview with government agents. Another important finding to this result is the respectful and comfortable manner in which the interview was conducted. Akpan was in one of the most inviting, open, and comfortable portions of his home. He was seated comfortably on one of the couches of his choice. There are no allegations that any of the questions or comments by the interviewing agents were aggressive or overbearing. Although there were over ten agents involved in the search, only two of those agents sat down with Akpan and talked with him. There is no evidence that they used any strong arm tactics during the interview or assumed an

aggressive posture with Akpan. They explained to him that he did not have to talk, but Akpan agreed to do so, explaining to the agents that he had nothing to hide.

For these reasons, the Court holds that Akpan was never in custody and that his Fifth Amendment right against self-incrimination was not violated. This holding is consistent with the Ninth Circuit's observation that "courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature." *Craighead*, 539 F.3d at 1083 (citations omitted).

CONCLUSION

IT IS HEREBY ORDERED that the Magistrate Judge's R&R is AFFIRMED and ADOPTED. (#129). IT IS FURTHER ORDERED that Akpan's Motion to Suppress is DENIED. (#68).

DATED: February 12, 2009

Robert C. Jones
United States District Judge

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